

No. 83-1591

APR 25 1984

ALEXANDER L. STEVAS
CLERKIN THE
Supreme Court of the United States

OCTOBER TERM, 1983

CHARTER CONSOLIDATED, LTD., *et al.*,
Petitioners,
v.ANTHONY A. BARBER, *et al.*,
Respondents.On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

For the reasons stated herein, respondents believe that petitioners' request for a writ of certiorari should be denied.¹

SUMMARY OF ARGUMENT

Petitioners assert two "questions presented" for review by this Court. The first is whether "the due process clause . . . was violated by the [lower courts'] exercise of *in personam* jurisdiction over a foreign parent

¹ Petitioners seek a writ of certiorari to the Supreme Court of Pennsylvania. That court, however, simply declined to exercise discretionary review over the decision of the Superior Court of Pennsylvania, without itself passing on the merits of the jurisdictional issues. On the assumption that Charter means to request review of the Superior Court's decision, we respond to Charter's petition as though it were a petition for a writ of certiorari to the Superior Court of Pennsylvania. See *Callender v. Florida*, 383 U.S. 270 (1966).

corporation [i.e., Charter Consolidated, Ltd.] based solely upon the parent's ownership of subsidiaries [i.e., principally Cape Industries, Ltd.] which were present in the forum state." (Petition, at 1) (emphasis added). This question is simply not posed by this case. The courts below did not exercise jurisdiction over Charter by reason of Charter's mere ownership of Cape, but on the basis of findings—amply supported by the record—that Charter actually controlled and participated in Cape's business affairs, including the activities giving rise to plaintiffs' cause of action. And petitioners concede that a court may exercise *in personam* jurisdiction over a parent corporation in such circumstances.

Petitioners' second "question presented" is whether "the due process clause . . . was violated by the exercise of *in personam* jurisdiction over a foreign corporation [Charter] whose only contacts with the forum state consisted of occasional visits to the state by employees, . . . unrelated to the cause of action." This question is directed at an alternative holding of the Pennsylvania Superior Court, predicating *in personam* jurisdiction over Charter based on Charter's contacts with Pennsylvania apart from Charter's domination over and participation in Cape's business transactions in Pennsylvania. This alternative holding is not necessary to the disposition of this case.

In any event, petitioners' second "question presented," like the first, begs the question actually posed in this case. Petitioners' characterization of Charter's transaction of business in Pennsylvania as "occasional visits to the state by employees" disregards the findings of the courts below. Petitioners' quarrel is with those findings and with the lower courts' application of the appropriate legal standard to those findings. Petitioners do not dispute the legal standard applied below, namely, whether Charter conducted a "continuous and systematic" part of its general business in the forum state. Petitioners' factual challenge does not warrant review by this Court.

ARGUMENT

1. Petitioners' first "question presented" is whether "the due process clause . . . was violated by the [lower courts'] exercise of *in personam* jurisdiction over a foreign parent corporation [Charter] based *solely* upon the parent's *ownership* of subsidiaries [principally, Cape] which were present in the forum state." (Petition, at i) (emphasis added). Petitioners' first "question presented" is not posed by this case. The lower courts did not assert jurisdiction over Charter simply by virtue of Charter's *ownership* of Cape. Rather, they relied on Charter's domination of, and participation in, Cape's business activities, including the very activities alleged to have caused plaintiffs' injuries. And petitioners concede that *in personam* jurisdiction may properly be exercised over a foreign parent corporation in such circumstances. See *infra*, at 8.

Petitioners base their first "question presented" not on what the lower courts actually found, but on petitioners' view of the record, which has been consistently rejected by the courts below. Thus, petitioners assert that Cape "was run independently of Charter" during the entire period (1964-1972) that Cape supplied asbestos to Pittsburgh Corning; and, more particularly, that Charter "never participated in decisions concerning . . . [Cape's] portfolio investments; budgetary matters; advertising practices or marketing strategies; the organization, operation and structure of Cape subsidiaries; or the mining, marketing, prospecting or sale of asbestos." (Petition, at 5). In short, petitioners maintain that Charter and Cape had an arms-length relationship at all relevant times.

The Superior Court found, however, upon consideration of the extensive record in this case, that the facts did not support Charter's assertion (Petition App. B, at 9a-10a) (emphasis added):

While Charter sought [in its brief and argument before the court] to divorce itself from Cape and to depict it as an almost unrelated entity, the record clearly refutes such a position. . . [A]lthough Cape may technically *appear* to be an independent business entity, the record shows clearly the extent to which it comprises an operating arm of Charter.

As the court explained, "Charter is itself only a holding company which has chosen to perform all its business functions through operational arms that happen to be set up legally as separate corporations." (*Id.*, at 14a; see *id.*, at 9a). These subsidiary corporations are organized "within Charter's four main divisions, which are Mining, Industrial, Finance and Administration and Services. Thus, for instance, Charter's headquarters staff, including executives, are formally employed and paid by a wholly owned subsidiary." (*Id.*, at 9a).

Charter's Industrial Division—one of Charter's operational departments—"actually consists of a collection of subsidiaries," including Cape.² (*Ibid.*). As the record shows, Charter has elected to conduct its operations through subsidiaries, rather than through intra-corporate departments, in order to "get the most efficient result[s]." (R. 1414a.) As the head of Charter's Industrial Division, who was at the same time Chairman of Cape's Board, testified, "I entirely accept that it is by no means

² Charter uses wholly owned subsidiaries, which Charter administers at its offices in London, to hold the stock of Charter's industrial subsidiaries. Two of these holding companies, Charter Consolidated Investments and Central Mining Finance—co-competitioners herein—hold the shares of Cape. As Charter acknowledges (Petition, at 8 n.1), the jurisdictional issues relating to Charter Consolidated Investments and Central Mining Finance are identical to those relating to Charter. The Superior Court held—based, *inter alia*, on Charter's own concessions—that "[t]he record shows that both of [these] subsidiaries were administrative tools used by Charter to hold the stock of Cape." (Petition App. B., at 4a n.1).

the only way one would do it. If I may say so, I think of more importance to a business is the way it is run rather than formal organization." ³ (R. 1415a; see also R. 1242a-1243a.) And as the Superior Court found, "[d]espite such separate incorporation, Charter's total control over Cape . . . is so clear, that to reach any other conclusion in this case would be to blindly exhaust form over substance" (Petition App. B, at 14a).

The Superior Court recognized that Charter, itself, had expressed its intention to assume control over Cape as an integral component of Charter's own industrial activities. In the course of acquiring over 60 percent of Cape's common shares, Charter's shareholder prospectus explained (quoted in Petition App. B, at 10a) (emphasis added) :

It is Charter's purpose to make use of the wide experience of Cape's management so that Cape can become the main channel for the expansion of *Charter's industrial activities* of this type; this could not be satisfactorily achieved unless Charter acquired a considerably larger holding such as would give Charter control of Cape.

The Superior Court found: "The record makes it clear that since it acquired such a substantial ownership of Cape, Charter has been well represented by its own executives placed on Cape's Board of Directors." ⁴ (Peti-

³ The testimony quoted in text described both Cape's organizational structure and the organization of Charter's Industrial Division. (See R. 1412a-1415a, 1423a-1425a).

⁴ From the inception of Charter's relationship with Cape, Charter was represented on Cape's Board by two of eleven directors. (R. 1322a; 674a-698a.) Following Charter's takeover of Cape in 1969, Charter placed a third director on Cape's Board. The Chairman and Managing Director of Cape at that time, R. Dent, unsuccessfully resisted Charter's efforts to put more than two representatives on Cape's Board. As Dent testified, "Two is enough . . . [t]o protect" Charter's interests. (R. 1352a.) Dent believed that if Charter thought "their interest [was] being harmed they have the power

tion App. B, at 10a). The Charter representatives placed on Cape's Board were drawn from the highest ranking Charter officials, and one of these representatives usually assumed the post of Chairman or Deputy Chairman of Cape. (R. 324a; 1057a, 1199a, 1213a; 1267a; 1328a; 1351a; 1396a; 1439a, 1449a-1450a; 1452a-1453a.) And, as the court found, "Charter has retained and exercised full control over [this] subsidiar[y] through [Cape's] Board[] of Directors." (*Id.*, at 14a). Thus, one of Charter's directors acknowledged that there was no instance during his tenure on Cape's Board (1970-1980) "in which the Executive Directors of Cape out-voted the Charter Directors who were opposed to any particular proposal put forward at a Board Meeting." (R. 1463a-1464a). In the same vein, Cape's Chairman and Managing Director (*i.e.*, Cape's chief executive officer) testified that he abided by Charter's wishes, "conscious" that if he "opposed the Charter directors' wishes . . . they have the power to overcome [his] position in any event." (R. 1364a.)

In exercising its control over Cape, as the Superior Court found, Charter "participated in Cape's important business decisions" (Petition App. B, at 10a), which covered the gamut of Cape's activities—including those giving rise to plaintiffs' cause of action. (Indeed, Cape's principal business activities at all relevant times were the mining and sale of asbestos; until recently, Cape Industries, Ltd., was called "Cape Asbestos, Ltd."). Thus, Charter dictated decisions concerning "[c]ommercial and

at the next Board meeting to elect quite a few more [directors].... There are all sorts of things they could do, we knew that and they knew that, and it seemed pointless to waste people's time by putting any more than two representatives on the Board." (*Ibid.*)

Cape paid the directors' fees earned by Charter's representatives on Cape's Board directly to Charter, rather than to the directors personally. (R. 1200a.) Following Charter's takeover of Cape in 1969, Charter brought onto its Board as a director the Chairman and Managing Director of Cape. (R. 1410a.)

financial decisions of Cape and its subsidiaries," "changes in the reorganization of Cape or its subsidiaries," "portfolio investment by Cape or its subsidiaries," "the prospecting, the mining development [and] technical advice regarding asbestos" (R. 1376a-1377a); "the pricing of asbestos," "health warnings about . . . asbestos," and the "marketing of asbestos" (R. 1380a-1381a; see Dep. of R. Dent, at 166); and the sale of Cape's asbestos mining operations* (R. 1375a, 1377a; 1036a-1038a; 1399a-1400a).

Contrary to Charter's representations in its Petition, it was "[t]his total involvement by Charter in Cape's affairs"—including the very activities causing plaintiffs' injuries—that warranted the court's conclusion "that through Cape, Charter has engaged in business affairs in Pennsylvania to a degree sufficient to assert *in personam* jurisdiction over Charter."* (Petition App. B, at

* One of the common Charter/Cape directors testified that he, for one, felt the future for asbestos sales was not likely to be favorable in part because of the "well-known health objections to its use." (R. 1358a.) He, along with his colleagues on Cape's Board, however, reached the "consensus" that it "would be wiser to continue until the reasons for trying to dispose of [the asbestos mining operations] became stronger." (*Ibid.*)

* In asserting jurisdiction over Charter, the Superior Court (and the Court of Common Pleas) relied, as well, on Charter's control over a pair of industrial subsidiaries known as the "Pandrol Group"—which beyond "question . . . engaged steadily in business affairs in" Pennsylvania (Charter has conceded that the Pandrol companies "were present in Pennsylvania," Charter's Superior Ct. Brief, at 48). "Although Charter again [sought] to segregate itself from Pandrol in the face of this jurisdictional problem," the Superior Court observed, "the facts simply do not support Charter's position." Based on the record as a whole, the court concluded that "[i]t simply cannot be realistically maintained that Charter and Pandrol are, in substance, independent entities." (Petition App. B, at 10a-11a). The Superior Court's reliance on Charter's control over the Pandrol Group was not necessary to the court's decision, in that Charter's control over and participation with Cape in the business activities giving rise to plaintiffs' cause of action provides an ample

10a). The court below found that Charter did not merely own Cape, as Charter insists, but "made [Cape a] constituent part[] of its [own] operating divisions." (*Id.* at 14a). And by its "domination and control" over Cape, Charter "render[ed] the subsidiary a mere instrumentality of the parent." (*Ibid.*).

Charter's quarrel with the decisions of the lower courts reduces fundamentally to a dispute over the facts established by the voluminous record in this case, or over inferences to be drawn from those facts. Thus, Charter's first "question presented" is built upon Charter's factual perspective, not on the findings of the lower courts or on what the record, in its entirety, actually shows. Charter concedes, as a legal matter, that "a court is justified in asserting jurisdiction over a foreign parent whose subsidiaries have contacts with the forum . . . if it can be demonstrated that the subsidiary is the . . . 'mere instrumentality' of the parent." (Petition, at 10). And, as just noted, this very finding was made by the lower courts in this case. Accordingly, Charter's first "question presented" is simply not posed by what the lower courts in this case actually decided.⁷

basis for *in personam* jurisdiction. But, in any event, this additional factor furnishes further support for the Superior Court's decision.

⁷ Based on its mischaracterization of the holdings below, Charter asserts that those holdings conflict with this Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925) and other lower court decisions that "have interpreted *Cannon* to hold that a court is justified in asserting jurisdiction over a foreign parent whose subsidiaries have contacts with the forum only if it can be demonstrated that the subsidiary is the 'alter ego' or 'mere instrumentality' of the parent." (Petition, at 10). As we have described, the lower courts here held that the very standard Charter endorses was satisfied in the circumstances of this case. That should dispose of Charter's reliance on cases embracing that standard.

In any event, this Court's decision in *Cannon* does not purport to establish federal due process principles binding on the states. The Court in *Cannon* addressed, in the context of a diversity case,

2. Petitioners' second "question presented," like the first, is predicated on a characterization of the record at odds with the findings of the courts below. Putting aside the lower courts' reliance on Charter's involvement in Cape's affairs, and focusing on the lower courts' consideration of Charter's direct transaction of business in

whether a foreign corporation was "present" in the forum state, for purposes of service of process, by virtue of the presence of a subsidiary. *Cannon*, which pre-dated *Erie R. Co. v. Tompkins*, 804 U.S. 64 (1938), resolved this issue by resort to general federal corporate law principles. The Court expressly acknowledged that "[n]o question of the constitutional powers of the state, or of the Federal government, is directly presented[;] [t]he claim that jurisdiction exists is not rested upon the provisions of any state statute, or upon any local practice dealing with the subject." 267 U.S., at 337. See also *United States v. Scophony Corp.*, 333 U.S. 795, 804 n. 18, 812-818 (1948).

The Pennsylvania courts in this case properly applied the federal constitutional principles that govern a case such as this. The constitutional inquiry is whether the defendant's "conduct and connection with [the forum state] are such that [it could] reasonably anticipate being haled into court" there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Suit may be brought in any forum in which the defendant corporation has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980); accord, *Keeton v. Hustler Magazine, Inc.*, 52 L.W. 4346, 4349 n.13 (U.S. Mar. 20, 1984). As we have described, the Superior Court found that Charter "participated in Cape's important business decisions"—which included the very decisions giving rise to plaintiffs' cause of action (see *supra*, at 6-7)—and, indeed, exercised "total control over Cape." (Petition App. B, at 10a, 14a). Having participated in—indeed, having controlled the outcome of—the business decisions (concerning the sale of thousands of tons of asbestos to Pittsburgh Corning) giving rise to plaintiffs' injuries, Charter's "conduct and connection with" Pennsylvania plainly justified the lower courts' exercise of jurisdiction over it.

Pennsylvania,⁸ petitioners suggest that "the due process clause . . . was violated by the exercise of *in personam* jurisdiction over a foreign corporation whose only contacts with the forum state consisted of occasional visits to the state by employees, . . . unrelated to the cause of action." (Petition, at i).

As a threshold matter, it is significant that Charter's direct business activities in Pennsylvania documented in the record by no means constitute the totality of Charter's transactions in that State on an ongoing basis, even without regard to Charter's involvement in the affairs of its subsidiaries. As the Superior Court observed, "[i]n the course of discovery in this case[,] Charter refused to supply information about such contacts with our Commonwealth occurring more than a year prior to the filing of this suit." (Petition App. B, at 11a). As the timing of plaintiffs' suit was entirely coincidental to Charter's transaction of business in Pennsylvania, the Superior Court treated the activities documented during the one-year time frame for which Charter provided discovery as merely representative of Charter's ongoing contacts with that State.

In this context, the Superior Court found that Charter's direct activities in Pennsylvania "constituted 'a continuous and systematic part of [Charter's] general business,' " and accordingly concluded that these activities were "of sufficient magnitude to make it fair and reasonable to exercise jurisdiction over Charter." (*Ibid.*). The court explained (*id.*, at 15a-16a):

This conclusion is mandated by the record, which demonstrates that even within the limited period of

⁸ It bears emphasis that Charter's domination of Cape's business activities provides sufficient grounds for the lower courts' assertion of jurisdiction over Charter, regardless of Charter's other contacts with Pennsylvania. Whether such other contacts provide an independent basis for jurisdiction is a question not necessary to the resolution of this case.

time for which it submitted responses in discovery, Charter's own business contacts with our State were quite diverse in nature, and broad in scope. The record shows that in a single twelve month period, several different Charter representatives, from at least three of its separate operating divisions, visited our Commonwealth for business transactions. These direct business involvements by Charter were not limited to a single customer or business project, but included five separate Pennsylvania based customers or concerns, and dealt with matters as diverse as sales of minerals, acid plant compressors, and remote control devices, and other business projects and research endeavors. Further, during the same limited time period about which it made disclosures, Charter was not only a seller, but also purchaser, obtaining 300 shares of stock in a transaction through a Philadelphia broker. Based upon these transactions, all within the year prior to the filing of this suit, we find no merit in Charter's claim that it had not itself engaged in business in our Commonwealth sufficient to justify the assertion of jurisdiction by our courts.

Charter's effort to characterize its purposeful resort to Pennsylvania's market—which is highly developed in the areas of Charter's key business interests—as "five isolated and unrelated visits" (Petition, at 16) ignores the quality of those business contacts in the context of Charter's general business objectives and activities, and the fact that the transactions documented through discovery must be taken as merely indicative of Charter's ongoing relationship with the forum state.

In any event, this case presents no issue as to applicable legal principles. As noted, the Superior Court determined that Charter's activities in Pennsylvania constituted a "continuous and systematic part of its general business"—which, as petitioners acknowledge, is the federal due process standard governing the exercise of personal jurisdiction based on activities unrelated to the

plaintiffs' cause of action.⁹ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, No. 82-1127 (Apr. 24, 1984), slip op., at 7 ("continuous and systematic");¹⁰ *International Shoe Co. v. Washington*, *supra*, 326 U.S., at 318 ("continuous" and "substantial"); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446, 448 (1952) ("continuous" and "substantial"; "continuous and systematic"). Based on a view of the facts at odds with the findings of the lower courts, petitioners challenge the lower courts' application of this standard to the facts of this case. Petitioners' fact-oriented challenge does not warrant this Court's time or attention.

⁹ Pennsylvania's long-arm statute incorporates this federal constitutional standard. (Petition App. B, at 7a & n.4).

¹⁰ This Court's decision in *Helicopteros* does not affect the disposition of the instant case for two reasons. First, jurisdiction in *Helicopteros* was dependent exclusively on activities in the forum state unrelated to the cause of action in that case. Here, by contrast, Charter's domination of Cape's affairs—including Cape's sales of asbestos, Cape's central business activity—provide a sufficient basis for jurisdiction independent of Charter's activities in Pennsylvania unrelated to plaintiffs' cause of action. (See note 8, *supra*). Second, even with respect to the Superior Court's alternative holding predicated on jurisdiction on Charter's activities in Pennsylvania unrelated to plaintiffs' cause of action, *Helicopteros* is clearly distinguishable from the instant case on its facts. The defendant's principal contacts in the forum state in *Helicopteros* consisted of purchases and purchase-related activities. Purchases are at best incidental to the core business activities of a company—*i.e.*, those that produce revenue. Charter, by contrast, had contacts with Pennsylvania of a more substantial character. Even putting to one side Charter's transaction of business there in conjunction with Cape, Charter's activities in Pennsylvania were fee-generating activities going to the heart of Charter's principal business concerns. By contrast to the defendant in *Helicopteros*, Charter has unquestionably sought to exploit Pennsylvania's market to advance Charter's core business interests.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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